

STATE OF MICHIGAN
COURT OF APPEALS

ANNA ROZENBERG,

Plaintiff-Appellant,

v

DOEREN MAYHEW & CO., P.C., and BRUCE
KNAPP,

Defendants-Appellees.

UNPUBLISHED

July 29, 2014

No. 315423

Oakland Circuit Court

LC No. 2012-124550-NM

ANNA ROZENBERG,

Plaintiff-Appellant,

v

ALEXANDER, EISENBERG & SPILMAN, P.C.,
EISENBERG & SPILMAN, P.C., and LAURA
EISENBERG,

Defendants-Appellees.

No. 315424

Oakland Circuit Court

LC No. 2012-127559-NM

Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order dismissing all of plaintiff's claims against all defendants with prejudice. We affirm.

Plaintiff filed two complaints. In her first complaint, plaintiff alleged that defendants Doeren Mayhew & Co., P.C., and Bruce Knapp (hereafter "accountant defendants") committed accounting malpractice when evaluating the value of certain property owned by plaintiff's husband, from whom she was divorcing. In her second complaint, plaintiff alleged that the counsel she retained for her divorce, defendants Alexander, Eisenberg, & Spilman, P.C., Eisenberg & Spilman, P.C., and Laura Eisenberg (hereafter "Eisenberg defendants"), committed malpractice because they "knew, or should have known, the actual income and fringe benefits Mr. Rozenberg [plaintiff's husband] received" from his two businesses. Plaintiff alleged that

Eisenberg defendants did not conduct adequate discovery, which inhibited Eisenberg defendants' ability to represent plaintiff's interests. Plaintiff's cases against accountant defendants and Eisenberg defendants were consolidated.

Both accountant defendants and Eisenberg defendants filed motions to compel discovery in the trial court. On March 6, 2013, the trial court held a hearing on separate motions to dismiss that had been filed by defendants. Eisenberg defendants summarized their position:

We have been before your Honor several times, trying to get basic information, so that we can defend our clients in this case and we've been stymied and -- and you have been very patient in giving Ms. Rozenberg time to get new counsel, time to answer these, she simply has failed to do that. So we are asking that this Court dismiss the complaint at this time against my clients.

Accountant defendants agreed with Eisenberg defendants and explained to the trial court:

We really don't know what this is all about and we have asked in discovery for the basics and don't have it. We don't know what standard was violated, what was the alleged negligence, who's the expert and all of that . . . , the answer is will be determined by legal counsel when retained. Well that is precisely the -- the excuse that this Court has been patient about but ultimately rejected.

Plaintiff contended that all defendants were "bullying me because I don't have an attorney." Furthermore, plaintiff claimed, like she had previously, that her attorneys were on vacation. The attorneys she claimed to have retained were Sheldon Miller and Dennis Bagley. The trial court, however, noted that neither of these two attorneys had notified trial court that they were appearing on plaintiff's behalf.

At the conclusion of the hearing, the trial court stated:

All right, I -- there's been mention that the dates were extended and I just want to clarify for the record there was a meeting with my research attorney and the dates were extended but that was with the understanding that the Court's orders regarding outstanding discovery were still going to be met. If the answers had been provided, giving the names of the witnesses and experts, the that additional time would've been needed by the Defendants to depose these people and get information regarding their background. So it wasn't a -- a free card to just wait until June to -- to answer the already long outstanding discovery. This case has been -- is over a year old now, was a year old on January 27th, there still hasn't been any information provided in regard to who are the witnesses, who would be the experts or any explanation of the theory of the case.

Following the hearing, the trial court entered an order dismissing all of plaintiff's claims with prejudice.

Plaintiff now contends that the trial court did not consider alternative sanctions. The failure to do so, plaintiff contends, constituted an error requiring reversal. We disagree.

“The standard of review for decisions regarding sanctions for discovery violations is abuse of discretion.” *Jilek v Stockson (On Remand)*, 297 Mich App 663, 665; 825 NW2d 358 (2012). “An abuse of discretion occurs when the decision results in an outcome outside the range of principled outcomes.” *Id.* at 665 (internal citation and quotation marks omitted).

MCR 2.313(B)(2)(c) provides that a trial court may sanction a party who “fails to obey an order to provide or permit discovery” and may, accordingly, “dismiss[] the action or proceeding . . .” The Michigan Supreme Court has held that dismissal of a case under MCR 2.313(B)(2)(c) for discovery violations “is to be applied only in extreme cases.” *Schell v Baker Furniture Co*, 461 Mich 502, 509; 607 NW2d 358 (2000) (internal citations and quotation marks omitted). In *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 86; 618 NW2d 66 (2000), this Court stated:

The Michigan Court Rules at MCR 2.313(B)(2)(c) explicitly authorize a trial court to enter an order dismissing a proceeding or rendering a judgment by default against a party who fails to obey an order to provide discovery. The trial court should carefully consider the circumstances of the case to determine whether a drastic sanction such as dismissing a claim is appropriate. Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply with a discovery request is accidental or involuntary. The record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it. [Internal citations omitted.]

“Dismissal is a drastic step that should be taken cautiously.” *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). In *Thorne v Bell*, 206 Mich App 625, 632-633; 522 NW2d 711 (1994), this Court held:

Before imposing the sanction of a default judgment [or a dismissal], a trial court should consider [1] whether the failure to respond to discovery requests extends over a substantial period of time, [2] whether an existing discovery order was violated, [3] the amount of time that has elapsed between the violation and the motion for a default judgment, [4] the prejudice to defendant, and [5] whether willfulness has been shown.

First, plaintiff failed to respond to discovery requests over a substantial period of time. On June 19, 2012, plaintiff inadequately responded to accountant defendants’ first request for interrogatories. On December 3, 2012, accountant defendants filed a motion to compel discovery. Eisenberg defendants filed a similar motion to compel discovery on November 14, 2012. On December 12, 2012, the trial court ordered plaintiff to provide full and complete answers to accountant defendants’ interrogatories by January 31, 2013. However, plaintiff did not comply with the court’s order, and on February 4, 2013, accountant defendants filed an initial motion to dismiss plaintiff’s case for plaintiff’s failure to comply with the trial court’s discovery order. Eisenberg defendants also filed a motion to dismiss for failure to provide discovery, arguing at the February 13, 2013, motion hearing that they had submitted “basic interrogatories” six months prior and were still awaiting answers. At the conclusion of the February 13 hearing, the trial court ordered plaintiff to provide answers to discovery for “both” [sic] defendants within

14 days. The order provided that plaintiff's claims against "all defendants" would be dismissed if she failed to comply. Plaintiff did not comply with this order and had not complied by the March 6, 2013, hearing on defendants' final motions to dismiss. Plaintiff had months to provide answers to outstanding discovery requests but did not do so.

Second, plaintiff violated two discovery orders. Plaintiff failed to comply with the trial court's December 12, 2012, order to provide full and complete answers to discovery requests. Plaintiff had more than one month to comply, but she did not. Additionally, plaintiff did not comply with the trial court's second order compelling discovery on February 13, 2013, which gave plaintiff 14 days to comply with the order.

Third, the amount of time that elapsed between plaintiff's first violation of a court order compelling discovery and the trial court's dismissal of plaintiff's case was over a month. Plaintiff had several weeks to comply with the trial court's December 12, 2012, order compelling discovery. She failed to comply with this order when she did not produce discovery by January 31, 2013. Ultimately, plaintiff's case was dismissed on March 6, 2013, after plaintiff failed to comply with the trial court's second order compelling discovery. Thus, over a month elapsed between plaintiff's first violation of a court order and the dismissal of her case.

Fourth, all defendants were prejudiced by plaintiff's failure to fully answer her interrogatories. For example, plaintiff did not adequately respond to basic requests like "[i]dentify each fact, witness and document on which plaintiff bases her allegation" and "[e]xplain in complete detail the nature and amount of all damages that plaintiff claims to have been proximately caused by defendants." Plaintiff's failure to adequately answer these interrogatories, over a long period of time, prejudiced all defendants, who were unable to prepare to depose plaintiff or her witnesses or to identify any expert-witness theories and who could not fully appreciate the claims in plaintiff's complaint, inhibiting all defendants' abilities to prepare a defense.

Fifth, it is a reasonable inference that plaintiff's failure to answer interrogatories was willful. Plaintiff used various excuses for why she could not answer the questions raised in the interrogatories, blaming her inability on the fact that she did not have counsel, but another time claiming to have retained counsel who were "on vacation" and yet another time stating that her attorney was "stuck in Bay City" There is simply no indication that the failure to answer was accidental or involuntary. *Kalamazoo Oil Co*, 242 Mich App at 86.¹ One can deduce from all the circumstances that plaintiff's failure to answer was willful.

Lastly, it is true that "[t]he record should reflect that the trial court gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it." *Id.* (internal citation and quotation marks omitted). While the trial court did not explicitly discuss other sanctions when dismissing plaintiff's case, the trial court had previously expressed to plaintiff that she must comply with the

¹ In addition, we note that some of the questions raised in the interrogatories were questions that plaintiff, with firsthand knowledge, should have been able to answer, even without counsel.

court order compelling discovery or her case would be dismissed. This warning indicates that the trial court did indeed attempt to avoid the harshest sanction available to it. Thus, the trial court did not err in dismissing plaintiff's case.

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Deborah A. Servitto